IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED :21-9-2007

CORAM

THE HONOURABLE MR. JUSTICE P.K. MISRA
AND
THE HONOURABLE MR. JUSTICE R. SUDHAKAR

O.S.A.Nos.406 and 407 of 2000

O.S.A.No.406 of 2000(O.P.No.908 of 1999):-

1.The State of Tamilnadu,
represented by its
Secretary to Government,
Animal Husbandry &
Fisheries Department,
Chennai-9.

2.The Director of Fisheries,
Anna Salai, Teynampet,
Chennai-6.

3.The Superintending Engineer,
Fisheries & Harbour Circle,
Nagercoil,
now at the office of the
Director of Fisheries,
D.M.S. Office,
Anna Salai, Chennai-6. ... Appellants/Petitioners

Vs.

1.K.Ramachandran,
Proprietor,
Complex Pile Foundations,
Chennai-600 014.

2.Justice K.M.Natarajan (Retd.),
117/1, L.B. Road,
Kamaraj Nagar,
Thiruvanmiyur,
Chennai-600 041. ... Respondents/Respondents

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O.S.A.No.407 of 2000 (Application No.1221 of 2000 in O.P.No.326 of 1999):-

1.The State of Tamilnadu,
represented by its
Secretary to Government,
Animal Husbandry &
Fisheries Department,
Chennai-9.

2.The Director of Fisheries,
Anna Salai, Teynampet,
Chennai-6.

3.The Superintending Engineer,
Fishing Harbour Project Circle,
Nagercoil,
now at the office of the
Director of Fisheries,
D.M.S. Office,
Anna Salai, Chennai-6. ... Appellants/Respondents

Vs.

K.Ramachandran,
Proprietor,
Complex Pile Foundations,
Chennai-600 017. ... Respondent/Applicant

Both O.S. Appeals are filed under Order XXXVI, Rule 1 of the High Court Original Side Rules read with Clause 15 of the Letters Patent against the Common Order dated 26.4.2000 passed by a learned single Judge of this Court in O.P.No.908 of 1999 and A.No.1221 of 2000 respectively in O.P.No.326 of 1999.

For Appellants in
O.S.A.Nos.406 and
407 of 2000 : Mr.S.Senthilnathan,
Government Advocate
D.Srinivasan, AGP.

For first respondent in
O.S.A.No.406 of 2000
and respondent in
O.S.A.No.407 of 2000 : Mr.G.R.Swaminathan

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For second respondent in
O.S.A.No.406 of 2000 : No appearance

COMMON JUDGMENT

(The Judgment of the Court was delivered by R.SUDHAKAR,J.)

Original Side Appeal No.406 of 2000 is filed by the appellants/petitioners in O.P.No.908 of 1999 challenging the common order dated 26.4.2000 passed by the learned single Judge, rejecting their claim for setting aside the Award dated 27.3.1999 passed by the sole Arbitrator in Application No.76 of 1995 in C.S.No.263 of 1987.

2. Original Side Appeal No.407 of 2000 is filed by the appellants/respondents in A.No.1221 of 2000 in O.P.No.326 of 1999 challenging the common order of learned single Judge dated 26.4.2000 allowing O.P.No.326 of 1999 to receive and confirm the award and A.No.1221 of 2000 to pass decree in terms of the Award dated 27.3.1999.

3. The parties, viz., the appellants are referred to as Department and the first respondent is referred to as claimant/ contractor in both the appeals for the sake of convenience.

4. The sole Arbitrator was appointed in C.S.No.263 of 1987 and he passed an award dated 27.3.1999. The Arbitrator filed O.P.No.326 of 1999 before this Court to receive and confirm the award dated 27.3.1999. The first respondent, the claimant filed Application No.1221 of 2000 in the said O.P.No.326 of 1999 to pass a decree in terms of the award. The appellants herein filed O.P.No.908 of 1999 challenging the award dated 27.3.1999. The learned single Judge by a common order dated 26.4.2000 in both O.P.Nos.326 of 1999 and 908 of 1999 and the A.No.1221 of 2000 allowed the Application No.1221 of 2000 and O.P.No.326 of 1999 and dismissed the O.P.No.908 of 1999. It is against this common order dated 26.4.2000, present appeals are filed.

5. The brief facts of the case as stated by the claimant is as follows:- The appellants floated a tender for the formation of R.C. Jetty at Valinokkam Fishing Harbour in Ramanad District. The nature of work was precasting and driving of R.C.C. Piles. The last date of receipt of tender was fixed on 30.12.1983 as per the tender schedule. The tender will be valid upto six months from 30.12.1983 to 29.6.1984. During the opening of the Tender, the first respondent/claimant made the following conditions:-

(1) Mobilisation charges of Rs.2 lakhs and Electric Power and Water Supply should be made available at the site by the Department and

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(2) Required cement and steel for the casting yard should be supplied by the Department free of cost

The first respondent/claimant submitted the lowest quote. On the request made by the Department by its letter dated 1.8.1984 claimant revalidated the tender and finally, it is stated that the claimant received the work order dated 26.3.1985. Since the work order was issued after lapse of 15 months, claimant sent a letter dated 28.3.1985 claiming 30% escalation as against 20% claimed earlier. At the request of the Superintending Engineer that the escalation amount will be paid on receipt of formal orders from the Government, claimant/contractor accepted the contract work on 20.4.1985. After accepting the agreement in the presence of Mr.G.Kaliasundaram, the then Superintending Engineer, the claimant brought all Pile Driving Equipment and machinery and the construction materials necessary for this project work in the site. Some portion of Pile Driving machinery, were hypothecated under the hypothecation agreement with the then Superintending Engineer Mr.G.Kaliasundaram on 18.5.1985 and received the recoverable mobilisation charges of Rs.2 lakhs as mentioned in the tender condition dated 30.12.1983. However, it is only on 4.7.1985 that the Department handed over the site. On 4.7.1985 itself casting of Pile work was started. During the casting of piles, the Department did not supply the required cement and steel and proper instructions were not given. However, the claimant has completed the casting of piles. Due to the aforesaid delay, the claimant incurred loss as the machinery and labour were kept idle. Further, 3rd appellant did not pay the full bill amount for the work done upto October, 1985 and has not prepared the escalation bill amount according to letter dated 6.4.1984. Due to non-payment of escalation bill amount as promised, the claimant was unable to make any progress in the driving of piles. After many oral representations and several letters, 3rd appellant arranged a Dredger in October, 1985 for the above work. The Dredger, however, sunk on its way near Pamban Bridge at Rameswaram on 30.12.1985. After several oral representations and reminders, made by the claimant, the Superintending Engineer G.Kaliasundaram sent a letter dated 12.1.1986 stating that the approval of the Government regarding escalation charges will be obtained within a month, however, even after lapse of four months the Department did not pay the escalation bill amount. By letter dated 12.7.1986, claimant requested the third appellant to settle claim amount including the pending bill amount and also to release the machinery and equipment, in default to pay simple interest at 18% per month from 15.9.1986. claimant further intimated that failure to settle the claim before 31.12.1986, the claimant will seek remedy as per law. Inspite of this, the Department had not released pending bills, escalation bill amount and further did not release machinery and equipment, and thereby crippled the claimant from taking any other contract work. Claimant stated that he was incurring loss day by day. The claimant, therefore, prayed for arbitration in terms of Clause 39 of General Conditions of the contract. Since the department refused to appoint an Arbitrator, claimant approached

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this Court by filing C.S.No.263 of 1987 for appointment of an Arbitrator to settle the claim amount and for release of machinery and equipment and other construction materials. Mr.C.R.Gopal, the then Superintending Engineer promised to arrange for a Dredger and instructed the claimant to start Pile Driving work. The Department paid 20% escalation amount on 27.7.1987 in G.O.No.791. However, by letter dated 14.1.1988, the Executive Engineer directed the claimant to refund the above said escalation amount. Trusting the words of the third appellant, claimant started the Pile Driving work for which the bill amount was not paid to the claimant inspite of several requests and reminders. The pile driving work could not be proceeded as the third appellant failed to arrange for a Dredger during 1988. Since the area was covered by sea sand, the jetty was not constructed as the seabed was not dredged. Instead of supplying a Dredger to enable the claimant to complete the work, the then 3rd appellant terminated the contract on 11.4.1989 while the piling work was in progress. Because of the failure on the part of the appellants Department for arranging a Dredger and dredging the seabed, the claimant was unable to proceed further with the Pile Driving work. Aggrieved by the termination of the contract without paying the claimant the Pile Driving Bill amount, Pile Casting Bill amount, Escalation Bill amount and other claims made earlier, as illegal and arbitrary, the first respondent/contractor sought for arbitration of the dispute. According to the first respondent/claimant due to delay at various stages he suffered huge loss and the non-use of machinery, equipment and other materials from 30.12.1983 to 11.4.1989, he suffered further loss. First respondent/contractor made a claim for Rs.2,46,42,498/- under various heads as follows:-

"CLAIM No.1:
Value of work done not yet paid - Claim according to agreement rates
Casting of 160 numbers of Piles:

1.Shuttering, Centering, Seafolding,
Steel Rods Bending & Building &
Oiling the shuttering & concreting
and curing all the works:

Lumpsum Rate for each Pile: Rs.5160/-

For 160 numbers of Piles : Rs.5160 x 160 Piles = Rs.8,25,000/-

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2.Handlying & Driving the Precast Piles:

Lumpsum Rate for each Pile: Rs.5870/-

For 10 Piles : Rs.5870 x 10 = Rs. 58,700/-

Total amount = Rs.8,83,700/-

Minus the Bill amount paid = Rs.2,20,000/-

Balance to be billed: Net amount due = Rs.6,63,700/-

Balance to be billed: Net amount due = Rs.6,63,700/-

CLAIM No.2:

Escalation Lumpsum @ 180% on the compelled work during the extended period beginning from 4.7.1984 to 11.4.1989

Completed work : Rs.8,83,700/-

Escalation @ 180% : $\frac{\text{Rs.8,83,700 x 180}}{100}$ = Rs.15,90,660/-

CLAIM No.3:

Non Recoverable Mobilisation charges not paid = Rs.3,00,000/-

CLAIM No.4:

Compensation for Losses suffered on account of overheads & Loss of profit during the stipulated period of contract from 4.7.1985 to 3.1.1986 = 6 months

a) Amount of contract = Rs.33,25,500/-

b) Overheads component of (a) 20% worked out during quoting of tender: = Rs.6,65,100/-

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c) Value of work done upto 3.1.89
(contract period of six months)= Rs.8,25,000/-

d) Prorate (b) on (c)
20% on Rs.8,25,000/- being
overhead & profit for 6 months = Rs.1,65,000/-

e) Net loss on overheads
profits on = (b) - (d) = Rs.5,00,000/- Rs.5,00,000/-

CLAIM No.5:

Losses suffered during the extended period
from 4.1.86 to 11.4.89 on account of
overheads & loss of profits for 39 months:

(a) Provision for overheads & profits
made by the claimant while
working out the revalidated
tender amount is = $\frac{\text{Item (b) in claim No.4}}{\text{6 months}}$

Contract period 6 months : $\frac{\text{Rs.6,65,100/-}}{\text{6 months}}$

Overheads & Loss of Profit
for each months : Rs.1,10,850/-

(b) Overheads & Loss of profit
during the extended period

per month : Rs.1,10,850/-
for 39 months : Rs.1,10,850/- x 39 = Rs.43,23,150/-

CLAIM No.6:

Damages due to Idle of Machinery, Equipment &
other construction materials withheld by the
respondents from 4.1.1986 to 22.6.93; Total 89 months:

Machinery Component : 35%

Contract value : Rs.33,25,500/-

For 35% for 6 months in the value
of contract : $\frac{\text{Rs.11,63,923/-}}{\text{6 months}}$

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Loss on account of idle of machinery
for each month : Rs.1,93,,987.50

For 89 months : Rs.1,93,987.50 x 89 = Rs.1,72,64,888/-

CLAIM AMOUNTS

Claim No.1	:	Rs. 6,63,700/-
Claim No.2	:	Rs. 15,90,660/-
Claim No.3	:	Rs. 3,00,000/-
Claim No.4	:	Rs. 5,00,000/-
Claim No.5	:	Rs. 43,23,150/-
Claim No.6	:	Rs.1,72,64,888/-
Total claim amount		Rs.2,46,42,498/-

Thus, claimant prayed for passing of award for Rs.2,46,42,498/-.

6. Respondents/Department filed a counter with counter claim as follows:- The value of the claimant's tender as submitted on 30.12.1983 was Rs.34,33,200/- and the same was reduced to Rs.33,25,500/- to secure the work for himself. After the reduction of rates, the Superintending Engineer recommended the tender to Director of Fisheries on 9.2.1984. The recommendation of the Superintending Engineer was considered at various other Departments and placed before the Tender Committee. The Tender Committee consisting (i) The Commissioner and Secretary to Government, Forest and Fisheries Department (ii) The Deputy Secretary to Government, Public Works Department (iii) The Director of Fisheries and (iv) Thiru G.Kaliyasundaram, the Superintending Engineer, Fishing Harbour Projects Circle considered the question of mobilisation advance and decided that a mobilisation advance of Rs.2 lakhs may be granted on the usual terms and conditions, which amount is to be recovered from the claimant's bills, while accepting the lower tender of the claimant for Rs.33,25,500/- with an excess of 2.90% over the estimate amount. Government in their G.O.Ms.No.268 P & F Department, dated 7.3.1985 accepted the tender offer of the claimant for Rs.33,25,500/- with excess percentage of 2.90% over the estimate and mobilisation advance was also sanctioned under usual terms and conditions. In the G.O. there was no mention of acceptance either to pay escalation at 20% of the tender rates or to grant Rs.3 lakhs (non-recoverable) mobilisation charges. During the interim period after the expiry of revalidation on 28.12.1984, the Superintending Engineer again requested the claimant in his letter dated 19.12.1984 to extend the tender rates for a further period of one

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month from 29.12.1984. Promptly, the claimant in his letter dated 21.12.1984 revalidated his tender rates for a further period of one month from 29.12.1984 to 28.1.1985. Claimant referred only to his earlier revalidation letter dated 2.10.1984 without any preconditions and not to his letter dated 31.8.1984 wherein preconditions had been stipulated. The Superintending Engineer in his letter dated 9.1.1985 submitted revalidation letter of the claimant for the further period from 29.12.1984 to 28.1.1985 to the Director of Fisheries. The Director of Fisheries in turn submitted the copy of letter dated 21.12.1984 of the claimant to the Government revalidating the claimant's tender upto 28.1.1985, whereas the claimant has alleged that the claimant had not accepted for giving further revalidity of tender, because there was further escalation in the prices of materials and labour. The allegation that the then Superintending Engineer Thiru G.Kaliasundaram promised to give work order within one month's time is denied. The work order was issued by the Superintending Engineer on 26.3.1985 after the Government accepted the tender vide G.O.Ms.No.268 dated 7.3.1985. There was no mention and no stipulation made either in respect of grant of non-recoverable mobilisation charges of Rs.3 lakhs in the work order. The claimant on receipt of the work order dated 26.3.1985 raised objection vide his letter dated 28.3.1985. The Superintending Engineer in his letter requested the claimant to execute the agreement and introduce a change in the agreement that escalation charges will be paid to the claimant on receipt of formal orders of Government "if approved". There was no whisper that the non-recoverable mobilisation charges of Rs.3 lakhs as wanted by the claimant will be paid to the claimant. Claimant requested the Superintending Engineer to delete the word "if approved" so as to pressure the Superintending Engineer to accept the escalation stipulation of claimant for 30% enhanced rates while the Superintending Engineer had no power or authority to grant escalation of rates. Once the negotiated tender offer was accepted by Government, the claimant may only accept the work order and execute the agreement or he may reject the work order and refuse to sign the agreement whereupon the Department may forfeit the EMD. Claimant added a further demand that the non-recoverable mobilisation charge of Rs.3 lakhs which had so far not been raised either in the claimant's revalidation upto 28.12.1984 or upto 28.1.1985 in his letters dated 2.10.1984 and 21.12.1984 respectively and also in the minutes of meeting of the tender committee on 4.12.1984 and G.O.Ms.No.268 dated 7.3.1985. The agreement dated 10.5.1985 was registered as CR.No.5/85-86. No special conditions were stipulated in the agreement except to state that mobilisation advance of Rs.2 lakhs shall be paid for procuring machinery and making preliminary arrangements at the site against hypothecation of machinery to the Government. This advance was to be recovered in ten equal instalments with interest at commercial rates from the first 10 consecutive bills after 20% work is done. G.O.Ms.No.268 dated 7.3.1985 provided for the grant of mobilisation advance of Rs.2 lakhs on hypothecation of machinery. Accordingly, on the claimant bringing his machinery to site and hypothecating the same, claimant was sanctioned the mobilisation advance of Rs.2 lakhs. Thus, it

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will be clearly seen there was no breach by the appellants Department in either accepting the negotiated tender of the claimant as per G.O.Ms.No.268 dated 7.3.1985 or in the sanction of the mobilisation advance by the Department on 18.5.1985 as per the hypothecation deed and insurance cover at pages 117 to 135 of the agreement. The mobilisation advance was paid to the claimant on 19.5.1985.

7. It is also stated that the claimant did not by any letter during the period in question before 4.7.1985 state that the appellants Department delayed handing over the site. The claimant did not withdraw from the contract on the basis that site had not been handed over timely. The agreement was signed by claimant on 10.5.1985 and the claimant took over the site on 4.7.1985. With regard to supply of steel, cement and other materials, the Department contended that there was no delay on their part and the claim of the first respondent/ contractor was misconceived. The fault was stated to be on the part of the contractor/first respondent. The Department also gave the details of payments made to the contractor refuting the claim that amounts were not paid for the work done. The amount claimed by the first respondent was disputed by the Department.

8. After October, 1985 the claimant did not carry out any work till November and December, 1988 when 10 piles were driven by claimant. There is no justification for this kind of delay and piece meal work in the sense even the 10 piles driven have not been fully driven and cut off. For handling 10 piles, payment is due to claimant. The payment due is Rs.15,000/- only. This works was not carried out in October, 1985 but only later during November and December, 1988 and in February 1989. The claimant has further falsely stated that third appellant has not prepared the escalation bill amount according to the letter dated 6.4.1985. As per the letter of Superintending Engineer addressed to the claimant, it was informed that the representation is being submitted to the Government. The Government considered the repeated request of claimant for escalation charges of 20% over tender rates and sanction escalation charges in G.O.Ms.791 F& F Department dated 17.7.1987. After 20.10.1985 no work had been done by the claimant till date of the said G.O. On issue of the said G.O., the escalation charges for work done until then by the claimant was paid on 27.7.1987. The payment so made was Rs.1,65,439/-. Thus there was no breach committed by the appellants Department. The above payment has been accepted by the claimant without demur and protest. Having been satisfied by such payment it is not left open to the claimant now to seek escalation. Hence the claim of the claimant under Claim No.2 for escalation once again at 180% for work already done and fully paid is not maintainable and liable to be rejected.

9. The payment escalation charges was not a condition stipulated in the contract or in the agreement. Even if it were, non-payment of escalation charges for any duration is not a cause on the basis of which the claimant may stop work. Claimant failed to discharge his duties as a lumpsum contractor and breached the contract by his failure to complete

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the work. Claimant further breached the contract by his failure to adhere to the rate of progress stipulated in the agreement at pages 6 and 40. The averment that the third appellant should arrange for a dredger for dredging pile driving area is not correct. Claimant should have driven atleast 3 piles per day, but the claimant did not do so and by his failure claimant breached the contract. Since claimant had carried out only 24% of the work even after nearly 4 years, the Department had no other option but to terminate the contract as the claimant had committed fundamental breach of contract. The fact remains that the contract period expired as early as on 3.1.1986 and the same has not been extended. As such, the contractual obligations between the parties did not extend beyond this period and whatever work had been done by the contractor after the efflux of the contractual period inspite of the conduct of the parties the contractor is to be paid for the work done as per the "Quantum Merit" enumerated in Section 70 of the Indian Contract Act 1872 (Central Act IX of 1872). After expiry of contract on 3.1.1986 the claimant has conveyed and driven incompletely 10 piles only in November, 1988 to February 1989. The claimant has claimed Rs.5,870/- per pile for handling and driving the same as per the agreement rate or his revised rate. For the purposes of valuing the work thus carried out by him for handling and driving 10 piles, the claimant even according to his own claim became entitled to Rs.58,700/-. The piles have not been driven to the set point, but have been stopped much above the set point. Therefore, the driving is incomplete and payment of the same cannot be made. Payment can be limited only to the handling of the piles for which a rate of Rs.1,500/- per pile is to be adopted as per the stipulations in the contract as there is no other evidence available. In view of the contract having ended on 3.1.1986 by efflux of time and further as affirmed by the claimant himself by his letter dated 12.7.1986 the contract has undisputedly come to end as on either of these dates and the same was further confirmed by the claimant in his letter dated 29.10.1986. There is no proof to show that the contract was kept alive beyond 3.1.1986.

10. The machinery of claimant had been hypothecated to secure mobilisation advance and the question of release of hypothecated machinery does not arise. It is stipulated under Clause 39 of the agreement that the contractor is prohibited from going for arbitration till the completion of the work. The claimant did not intimate the appellants Department that he cannot (1) complete the contract or (2) that he had no intention of resuming work or (iii) that he was frustrated on account of (a) lack of finance (b) lack of resources (c) lack of managerial and technical skill and expertise to simultaneously manage and execute work at 3 work sites in the sea (Thondi, Valinokkam quay wall and these RCC Jetties at Valinokkam) (d) that appropriate and necessary machinery and equipment of good quality and (e) efficient and effective labour, and therefore he was withdrawing from the contract. Hence, the claimant is not entitled to any relief at the hands of Arbitrator. However, as the disputes referred to are outside the scope of agreement and admittedly outside the scope of the contract period, the claims are not arbitrable

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and are also liable to be rejected in toto.

11. The Superintending Engineer by letter dated 29.10.1986 informed the claimant that the work was at a standstill and if work was not resumed by 10.11.1986, the contract will be terminated with forfeiture of EMD etc. To this letter the claimant vide his letter dated 3.11.1986 replied that he has resumed work on 27.10.1986, which is not correct. Again the Superintending Engineer issued notices to the claimant vide letters dated 1.6.1987, 22.7.1987, 4.8.1987, 19.10.1987 and 24.11.1987 for not resuming the work. The Director of Fisheries also issued notice to claimant instructing the claimant to resume work vide his letters dated 28.9.1987 and 3.11.1987. To all these letters there was no response from the claimant. It shows that there were no labourers at site of work from 20.10.1985 till work was resumed in November, 1988. Hence claim made under Claim Nos.4 to 6 are false. The claimant responded only in his letter dated 2.9.1988 stating that he was arranging to resume work. Earlier in letter dated 16.5.1988, the claimant had furnished his "programme" for resuming work. Claimant stated that he has to arrange two boats from Thondi to Valinokkam and then set up his pile driving machine on these boats and commence the pile driving. Review meeting was also held on 16.5.1988, in which it is recorded at page No.2 of the minutes that the pile driving machine and equipment at Thondi has to be moved to Valinokkam and assembled and thereafter 7 piles driven in the quay wall and the work in RCC Jetty at Valinokkam resumed thereafter. This graphically reveals that claimant neither had a working pile driving machine could be mounted for carrying out work of pile driving inspite of securing mobilisation advance of Rs.2 lakhs with the tender and paid on 18.5.1985 and escalation charges of Rs.1,65,349/- in July 1987 and the lack of machinery, equipment resources, labour and capital were also the reasons why claimant could not carry out work apart from wilfully abandoning work as such the claimant is totally ineligible for any claim (i) for idle labour and machinery and (ii) for loss of profit (claim Nos.4 to 6). In his letter dated 18.1.1989 addressed to the Superintending Engineer, the claimant has furnished the reasons as to why he did not do work after October 1985 stating "we stopped work as the escalation was granted very late in 1988". This is an unilateral and arbitrary action of the claimant and a clear breach of contract without any justification for which the claimant is solely responsible. Hence, the claimant is ineligible for any claim (i) for idle machinery and labour and (ii) for loss of profit (claims 4 to 6) after unilaterally and arbitrarily and wilfully stopping work and breaching contract when claimant could have executed the work.

12. The contract was terminated for delay and slow progress and breach of contract on 11.4.1989 vide the letter of the Superintending Engineer dated 11.4.1989.

13. Claimant has also secured escalation charges of Rs.1,65,439/- on 27.7.1987 which is Rs.97,506/- in excess of the actual amount due to

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claimant as escalation charges. Considering the amounts due to the Department no amount is payable to claimant for the driving of the 10 piles and payment is due from claimant in respect of excess payments received by claimant.

14. Since the work is incomplete no payment can be made. There is no stipulation that dredging has to be carried out first in order to carryout pile driving work. From February, 1989 until termination of contract on 11.4.1989 the claimant did not drive any piles. Hence, the claim Nos.3 to 6 are not maintainable and are not arbitrable.

15. The abstract of the Department's objection to the claim in the counter statement before the Arbitrator, is as follows:-

(i) In respect of Claim No.1, it is stated that full payment of Rs.8,25,195/- has been made for the pile casting.

(ii) In respect of Claim No.2, it is stated that the claim is purely fictitious and imaginary. Full payment has been made for the work done then and there immediately on completion of the work for Rs.8,27,195/-. No further work thereafter was carried out for which payment is due. No escalation is payable. It is also contended that no escalation could be paid because there is no provision for making payment for escalation in contract and agreement. The 20% escalation was granted in G.O.No.791 dated 17.7.1987 and paid on 27.7.1987.

(iii) In respect of Claim No.3, it is denied that the non-recoverable mobilisation charges of Rs.3 lakhs demanded by the claimant was not a term of the contract. It was denied by the third appellant himself at the very time it was raised. After the absolute denial of the claim, the claimant extended his tender validity vide his letters dated 2.10.1984 and 21.12.1984 after waiving the claim. The Claimant also waived the claim again unilaterally and come forward to sign agreement and execute the contract. Therefore, the Claim No.3 is unwarranted and denied.

(iv) In respect of Claim No.4, it is stated that for the work done and completed during the period of contract from 4.7.1985 to 11.4.1989 the claimant has been fully paid and no outstanding payment is due. In this contract, the claimant is a defaulter who clearly defaulted and breached the contract and failed to execute the work. He is ineligible for profit on the promise that merely because he had been awarded a contract he becomes eligible for a profit of 20%. The claimant was not prevented from doing work. Claimant abandoned the work and his inaction brought about termination of contract.

(v) In respect of Claim No.5, the loss of profit suffered during the period 4.1.1986 to 11.4.1989, it is stated that the value is an fictitious value of Rs.43,53,150/-. The claim is denied as entirely absurd and in the realm of make believe. During the period from 4.1.1986

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till 11.4.1989, the claimant abandoned the work and unilaterally removed whatever machinery there was and left the site to the wind and waves wilfully except for the period November, 1988 to February, 1989 when he incompletely drove 10 piles.

(vi) In respect of Claim No.6, it is stated that the claimant brought no pile driving equipment between 4.1.1986 to November, 1988. As per the claimant letter dated 18.1.1989, the claimant brought boats from Cuddalore and pile driving equipment from Thondi and commenced driving of piles in November,1988. The claimant stopped work after February 1989. It was open to the claimant to redeem his equipment by paying up the mobilisation advance and interest thereon. Therefore the alleged damages due to idle machinery equipment and other construction materials withheld by the Department from 4.1.1986 to 22.6.1993 is entirely frivolous and absurd.

16. Counter claim of the appellants/Department are as follows:-

Counter Claim No.1:-

Claimant was paid a mobilisation advance of Rs.2 lakhs on 18.5.1985 after the acceptance of agreement on 10.5.1985 as per the provisions of the G.O. accepting the tender G.O.Ms.No.268, Forests and Fisheries Department dated 7.3.1985. This mobilisatoin advance amount of Rs.2 lakhs and interest thereon at 18% from 18.5.1985 to 17.9.1993 at Rs.3 lakhs in total Rs.5 lakhs has not been recovered from the claimant and is due recovery.

Counter Claim No.2:-

As per the provision of G.O.Ms.No.791, Forests and Fisheries Department dated 17.7.1985 escalation charges of Rs.1,65,439/- were paid on 27.7.1987. There has been on overpayment of Rs.97,506/- in making this escalation payment and the same was pointed out by the Accountant General. This has been demanded from the claimant vide Executive Engineer letters to the claimant dated 14.1.1988 and 19.5.1988. Since it is not paid by the claimant, the Department is entitled to as follows:

Overpayment made on 27.7.1987	= Rs. 97,506/-
Interest at 18% there on from 27.7.1987 to 17.9.1993	= Rs.1,07,749/-
Total	Rs.2,05,255/-

Counter Claim No.3:-

The contract period for the work lapsed on 3.1.1986. The claimant did not request extension of contract and no extension was granted. The claimant in his letter dated 12.7.1986 has stated that as on 12.7.1986 he rescinded the contract. Such rescinding of contract without just cause when the Department have acted faithfully and complied with every

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contractual obligations stipulated in the agreement entitles the Department to forfeit the EMD and security deposit of the claimant. Further the claimant failed to complete the work and also failed to maintain the rate of progress stipulated in agreement and thus, the claimant committed breach of contact. For such breach of contract the EMD and Security deposit has to be forfeited to the Department as per clause Nos.29 and 30(b) of agreement at page 61 and clause 37(b) page 63 of the agreement and relevant clauses of MDSS is as follows:-

Value of EMD forfeited to respondents	- Rs.26,000/-
Additional EMD	- Rs. 6,320/-
Value of S.D.(WHA) forfeited to respondents	- Rs.41,360/-
Total	- Rs.73,680/-

Total Counter Claims

Counter Claim No.1	:	Rs.5,00,000/-
Counter Claim No.2	:	Rs.2,05,255/-
Counter Claim No.3	:	Rs. 73,680/-
Total		Rs.7,78,935/-

In view of the above, it is prayed by the Department that the Claim of the claimant is to be rejected and the Counter Claim made by the Department is to be allowed.

17. Before the Arbitrator on the side of the claimant Exs.A-1 to A-207 were marked while the Department have marked Exs.B-1 to B-31. Claimant was examined as P.W.1 and one J.Venkatesan, Special Correspondent, Hindu was examined as P.W.2. On the side of Department one Jayaraman, Junior Engineer, Vallinokkam, Ramnad District was examined as R.W.1.

18. After perusing the oral and documentary evidence, the Arbitrator awarded a sum of Rs.72,57,165/- in favour of the claimant. However, it is stated that on return of forfeited machinery and equipment to the claimant, the Department is liable to pay the claimant only Rs.62,57,165/-.

19. Aggrieved against that award, the Department filed the Original Petition No.908 of 1999 to set aside the Award. In the original petition it is stated that the tender of the contractor/claimant was accepted and a formal agreement was signed. The time for completion of the contract was stipulated at six months from the date of handing over the site. The claimant did not complete the work in time and so the contract was

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terminated on 11.4.1999. Claimant commenced arbitration proceedings by filing suit C.S.No.263 of 1987. The second respondent, the sole Arbitrator passed an award on 27.3.1999 awarding a sum of Rs.72,57,165/- with interest at 18% per annum. It is stated that the Award was passed beyond the terms of the agreement. The Arbitrator had exceeded the scope of contractual authority in making the award. Claim No.1, i.e., for recovery of Rs.6,63,700/-, it is stated that it was made on the footing that the claimant had not been paid for the work done by him. The Arbitrator had framed number of issues. But he failed to appreciate the facts that the schedule of rates for each item given in Ex.B-2 agreement is the overall limit for the purpose of each and every item of work that is to be complied with. As such, Rs.7,08,500/- has been shown as the value of work done by the contractor in respect of 160 piles completed which includes cutting, bending and tying grills with tor steel, plain M.S. Bars for reinforcement, including the cost of binding wire. The important aspect in this item of work as stated in the schedule is that the steel shall be supplied by the Department to the claimant for the execution of the work. Therefore the amount of Rs.7,08,500/- is the overall value of the work that is involved in the entire project as regards steel and allied work. The Arbitrator has taken this value unnecessarily for the purpose of arriving at the value of work done by the claimant. The Arbitrator in page 21 of the Award dated 27.3.1999 has made reference to the said quantity of work and has wrongly interpreted the items of work in the contract and has applied the erroneous interpretation as yardstick for the purpose of arriving at the value of the work done. As such, the Arbitrator under Item No.20, included a sum of Rs.7,08,500/- and has added the same along with the claim made under Claim No.I(a) for making the award in terms of Claim No.I. After deducting the departmental recoveries, a sum of Rs.4,09,115/- has been awarded under Claim No.I. As stated earlier, the Arbitrator had complicated the listed items and their rates with that of the claims made by the claimant and thereby had awarded a sum of Rs.4,09,115/- without recourse to the actual materials placed before him. He also failed to take into consideration the estimated value of the particular work. He also failed to segregate the expenditure incurred by the Department with regard to materials supplied before arriving at the actual value of work done. If only this distinction in the value is made, then the exact value of work done by the claimant could be arrived at. It is stated that Ex.A-110 is a correspondence adjudicating upon the work involved in Thondi Jetty, which is a separate contract. The Arbitrator, inspite of objection raised by the Department, had admitted the said exhibit and has placed relevance for arriving at the conclusion upon which the award has been passed. A sum of Rs.43,500/- has been awarded under claim No.I in respect of item No.6 being the cost said to have been incurred for driving 10 piles. Arbitrator has also failed to take into consideration the various recoveries that were to be made on the payments for the contractor. Recoveries as regards mobilisation advance of Rs.2,00,000/- adding interest on the same and other recoveries a sum of Rs.4,66,470/- ought to have been recovered from the contractor/claimant. Arbitrator has failed to take into consideration

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of the exact quantum of work before deducting the same from the overall estimated work as found in Ex.B-2 agreement. It has been pointed out to the Arbitrator that the steel to the tune of 59 Mts. alone had been utilised. The Arbitrator without taking into consideration the actual expenditure, has given credit to the entire estimated quantity of 109 Mts. and upon erroneous estimation fixed the value of work done in a sum of Rs.11,56,250/-. The award with regard to Claim No.I is per se excessive besides has been passed without recourse to materials available on record. As regards Claim No.II, it has been made for escalation of the lumpsum contract amount at the rate of 180 per cent of the completed work during the extended period beginning from 4.7.1985 to 11.4.1989. The contract or agreement does not provide for any such escalation by its express terms. The very claim itself was opposed before the Arbitrator. It is stated that under Claim No.I, the Arbitrator had already found and awarded for the work done which the claimant has made claim. It is also stated that casting of piles was completed as early as on 28.10.1985 itself. The contract awarded to the claimant could be classified as follows:-

(a) Fabrication and casting of RCC Piles,
(b) Driving the piles into the sea at the marked positions and
(c) To cut off the piles and lay deck slabs.

It is stated that the first part of work, viz., casting of piles does not require much of skill and labour. As such, the claimant had completed the casting of piles, however, had failed to drive them in the sea and further work as contemplated in the contract. Only 10 piles were driven that too at the edge of the sea near to the shore. All these aspects were explained to the Arbitrator. However, overlooking the objections put-forward by the Department, the Arbitrator has awarded a sum of Rs.9,17,195/- as escalation for the work which was completed during the extended period, viz., from 4.7.1985 to 11.4.1989. The Arbitrator while accepting the contentions of the various assurance and promises said to have been given by the said Superintending Engineer, has omitted to take into consideration the scope of the contract that was awarded to the claimant. It is settled law that in the interpretation of contract that too when the other party is a Governmental agency, the written contract alone will be the basis of the rates and liabilities of the contracting parties. Ignoring the settled principles, the Arbitrator had accepted the contentions put-forth by the claimant from certain correspondences and assurances by Departmental Engineers, who did not have the sanction to make such assurances, has come to the conclusion about the entitlement of the various claims by the claimant. Hence, the escalation granted on the completed work for the extended period is de hors to contract/ agreement and, as such, liable to be set aside. The claimant also made claim of Rs.5 lakhs towards compensation for the losses alleged to have been suffered on account of overheads and loss of profit during the period of contract. This Claim is covered under issue No.4. The Arbitrator has considered Claim Nos.4 and 5. Claim No.5 is with regard to losses suffered during the extended and overheads during the said period. A claim of Rs.43,23,150/- has been made in Claim No.5. Arbitrator has awarded a sum of Rs.3,68,700/- under Claim No.4. The Arbitrator has found reasons for

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awarding the said sum on the basis that the Department has committed breach of contract and as such, the Arbitrator is of the view that the claimant could not complete the work. Arbitrator has granted 15% on the balance of work as award under this issue and as such has awarded a sum of Rs.3,68,700/-. However, Claim No.5 has been rejected in total. It is stated by the Department that under Claim No.6 a sum of Rs.1,72,64,885/- has been sought for by the first respondent. This claim has been made as damages due to idle machinery, equipment and other construction materials withheld by the Department from 4.1.1986 to 22.6.1993 for 89 months. Arbitrator has laid undue emphasis on the right of the Department to exercise seizure of termination of the contract on the machinery that were deployed by the contract. Arbitrator has referred to Ex.A-31, the order of termination that the redemption of hypothecation of machinery even on payment is ruled out. No attempt was made by the claimant to discharge the hypothecation. This being the case, it is ill-founded to allege that the Department refusing to release the hypothecation of machinery even on payment for the same. A sum of Rs.29,48,400/- has been awarded under this head, which is unjustified. However, adverse inference has been drawn against the Department for the reasons that the Engineers in-charge during the time of execution of the work have not been examined. Such inference shall not be drawn particularly, when the contract is entered into with Government, since the officials in-charge of works are subjected to transfer. The compensation amount has been arrived at by the Arbitrator based upon Exs.A-196 and A-197, which does not pertain to the contract work that has been the subject matter of dispute. They relate to some other contract and have nothing to do with the present one. The Arbitrator has taken Rs.546/- as rate per hour for the machinery. The award is a clear case of excess of contract. The Arbitrator, while awarding the refund of earnest money deposit and security deposit, has omitted to consider the counter-claims made by the Department. The Arbitrator has awarded the refund of mobilisation advance for the reason that the Department has committed breach, which is unjustified. Arbitrator has also fixed the value of machinery at Rs.10 lakhs and has provided a concession in the award that if the machinery are returned to the claimant, Rs.10,00,000/- be deducted from the rest of the award. In view of the reasons stated above, the award shall not stand to legal scrutiny. The interest at 18% is also thoroughly unwanted. Therefore, the Department prays for setting aside the award dated 27.3.1999 passed by the Arbitrator.

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20. In the counter filed by the claimant in O.P.No.908 of 1999, it is contended that the Department received the Award in April 1999. Petition for setting aside the award should have been filed within 30 days from the date of receipt of notice as provided under Article 119 of Limitation Act of 1963. But the Department have taken time till 28th October, 1999 to file this O.P. after lapse of six months from 23.5.1999 and on this ground alone, this O.P.No.908 of 1999 will have to be dismissed. Arbitrator passed this Award on issue-wise and some issues were decided in favour of the claimant and others rejected that is to say

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that the claimant succeeded in five issues, viz., issue Nos.1, 2, 4, 5 and 10 for the amount of Rs.79,55,165/- including interest and allowing a sum of Rs.6,98,000/- in favour of Department including interest and after deducting the amount of Rs.6,98,000/- from the award amount passed for Rs.79,55,165/- the amount passed in favour of the claimant is Rs.72,57,165/-. The claimant is entitled to get the damages by way of hire charges for idling of plant, equipment and machinery and other construction materials illegally withheld by the Department as per issue No.5 and the total claim amount in this regard is Rs.1,72,36,320/-. This claim was worked out only based on the calculation sheets for the hire charges for pile driving plant by the Department's Superintending Engineer and Executive Engineer and the calculation sheets were marked as Exhibits in the Arbitration proceedings as Exs.A-196 and A-197. But the Arbitrator allowed only a sum of Rs.29,48,400/- as against claimant's claim amount of Rs.1,72,36,320/-. It is stated by the claimant that he is accepting the award for Rs.72,57,165/- with interest. The claimant prays for dismissal of O.P.No.908 of 1999.

21. On considering the above contentions, the learned single Judge, by a common order dated 26.4.2000 received the Award passed by the Arbitrator and passed decree in terms of the Award by allowing the application No.1221 of 2000 filed by the claimant. Further, the learned single Judge dismissed the O.P.No.908 of 1999 filed by the Department. Aggrieved by the common order, present Original Side Appeals have been filed by the Department.

22. Learned counsel for the appellants/Department contended that the Arbitrator committed an error apparent on the face of the record as he had incorrectly taken into account the materials which have not been used for the completion of the work and further vital documents were not considered. It is contended by the counsel for the appellants/Department that the award of the Arbitrator relating to the quantum of work done cannot be accepted or sustained. It is the further contention of the appellants/Department counsel that the Arbitrator exceeds his jurisdiction by awarding escalation charges which was not contemplated and it is beyond the terms of the agreement. Without prejudice, it was contended that even if escalation is to be accepted, it can be only upto 20% and that has been paid by G.O.No.791 dated 17.7.1987. It was further contended that the Arbitrator is not correct and has mislead himself to determine the escalation cost and the quantum of escalation by comparing other contract. Another factor is that the Arbitrator has not taken into consideration the facts that the materials for the purpose of executing the works were supplied by the Department. It is further contended that the Arbitrator has concluded that there is breach of contract committed by the appellants/Department. The plea of the appellants/ Department is that the first respondent/claimant had by his own conduct had rescinded the contract and therefore, the award of the Arbitrator on the head, loss of profit and charges for the period during which the contract was in operation cannot be accepted or sustained in law. The further contention

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of the appellants counsel is that the award of the Arbitrator for the value of machinery is unacceptable and unsustainable in law.

23. The learned counsel for the first respondent/claimant, however, contended that the Arbitrator had taken into consideration all relevant materials placed before him while determining the quantum of the award. In the facts and circumstances of the case, the learned single Judge accepting the reasonings of the Arbitrator upheld the award with reasons and it should not be interfered with. The issues now raised in appeals as also before the learned single Judge are questions of fact which should not be reagitated in appeals.

24. The claim was made on several heads as has been extracted above. The Arbitrator has rejected the Claim No.3 in respect of mobilisation charges and Claim No.5 for loss suffered during the extended period from 4.1.1986 to 11.4.1989. However, the other claims were allowed in the following manner, the details which have been set out in para 7 of the learned single Judge's order and the same is extracted hereunder:-

> "7. Exs.A-1 to A-207 were marked on the side of the contractor and Exs.B-1 to B-32 were marked on the side of the department. About 17 issues have been framed in the arbitration proceedings and the arbitrator had elaborately discussed the oral evidence as well as the documents and given a finding. The contractor claimed under item No.1 a sum of Rs.6,63,700/- towards the value of work done. The arbitrator passed the award for a sum of Rs.4,59,115/- with interest. In respect of issue No.2, the contractor claimed a sum of Rs.15,90,660/- under the head escalation of cost and for which, the arbitrator awarded a sum of Rs.9,17,195/- with interest. Issue No.4 relates compensation for loss suffered on account of overhead and loss of profit during the stipulated period of contract and claimed a sum of Rs.5 lakhs and for which the arbitrator awarded a sum of Rs.3,68,700/- with interest. In respect of issue No.6 relating to damages due to idle machinery, equipments and other construction materials withhold by the department for a period of 18 months. The contractor claimed a sum of Rs.1,72,64,885/- and for which a sum of Rs.29,48,400/- is awarded and, for non-returning of the machinery, a sum of Rs.10 lakhs has been awarded. In respect of issue No.10, a sum of Rs.32,320/- has been awarded with interest and in all, the award is for a sum of Rs.79,55,165/-. The amount due to the department has been given as Rs.6,98,000/- and if the same is deducted, the department shall pay Rs.72,57,165/-. If the department returned the

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forfeited machineries and equipments, the sum of Rs.10 lakhs will be reduced and the department will be liable to pay only Rs.62,57,165/-. The department has preferred the petition only in respect of the claims, wherein the amount has been awarded by the arbitrator viz., issues 1, 2, 4, 6 and 10. The arbitrator had also awarded interest at 18% per annum for the amount awarded from 10.3.92 till date of award."

25. In this case, the tender notification was issued in the month of November, 1983 and it was opened in December, 1983. The first respondent/claimant was found to be the lowest tenderer. The validity of the tender was for a period of six months which would have expired by 29.6.1984. Therefore, the Department by its letter dated 1.8.1984 requested the first respondent/claimant to revalidate the tender for a further period of six months from 29.6.1984. The first respondent/ claimant consented by letter dated 31.8.1984 on certain conditions, viz., escalation charges and mobilisation charges (not recoverable). It appears that the first respondent/claimant gave a letter dated 2.10.1984 extending the validity of the tender upto 29.1.1985. Thereafter, the work order was issued on 26.3.1985 after the validity period. Since there was no indication with regard to the demand on the escalation of 20% sought for, the first respondent/claimant sent a letter dated 28.3.1985 pointing out the delay in acceptance of the tender and therefore, prayed for escalation at 30% and for Rs.3 lakhs towards mobilisation charges(non-recoverable). This letter dated 28.3.1985 was responded by the third appellant stating that the first respondent/claimant should proceed with the work and the representation for escalation would be issued if the Government approves the same. However, with some objection by letter dated 20.4.1985, the work order was accepted, with a rider that the escalation should be considered and the words "if approved by the Government" should be deleted. Thereafter, the first respondent/ claimant entered into hypothecation agreement and the site was handed over on 4.7.1985. On 8.10.1985, cement and other materials were supplied during the period October, 1985 to December, 1985. The casting of 160 piles were taken up and completed and that is not disputed. In December, 1985, it appears that the first respondent/ claimant could not complete the driving of the piles as dredging had to be done. It is not in dispute that the dredger, which was deputed for this work, sank near Pamban Bridge and there was some stalemate in the work. In view of the same, the first respondent/claimant started communicating with the third appellant for payment of escalation charges, pending bills, etc., which was not agreed to by the third appellant. Therefore, the claimant sought for arbitration of his claim, which was refuted by the third appellant. Thereafter, C.S.No.263 of 1987 was filed by the claimant for appointment of Arbitrator for settling the claim amount and for releasing machineries and equipments. In the meanwhile, on 17.7.1987 G.O.No.791 was issued by the Government granting escalation charges of 20% and for Rs.2 lakhs as mobilisation advance (recoverable). On 27.7.1987, the 20% escalation

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amount was paid. Thereafter, in July, 1988, the claimant started the pile driving work, but, however, did not complete the same as the dredger was not arranged by the Department. On 11.4.1989, the contract was terminated by the Department and the machineries and equipments were not returned.

26. In this background of the case, the Arbitrator took up Issue Nos.12 and 13 which were relevant for the purpose of deciding the rival claims. The issues were whether there was delay in acceptance of the tender and handing over the site for casting of piles and therefore, whether the claimant was entitled for escalation and compensation for loss of profits and damages. In paras 41 to 52, the Arbitrator has discussed the various documents that have been filed and also the oral evidence to come to the conclusion that the Department had taken an unusually long period of time to conclude the contract and sought for revalidation of the tender from time to time. In para 52, the Arbitrator concluded that there was a delay of 16 months and 11 days in accepting the tender and further delay of two months in handing over the site.

27. In Issue No.14, the Arbitrator went into the question of delay in supplying the cement and steel by the appellants and the consequence thereof. The same was dealt with in paras 53 to 59 and based on oral and documentary evidence, particularly, the evidence of P.W.1, R.W.1 and Exs.B-5 and B-32, the Arbitrator held that there was no supply of cement from 25.8.1985 to 8.10.1985 and there was also a delay in cement supply immediately after in handing over the site on 4.7.1985. Insofar as the supply of steel is concerned, the Arbitrator found that there was no delay.

28. Issue No.15 relates to supply of water and electricity and was found in favour of the Department.

29. Issue No.16 relates to the plea whether dredging of sand was essential for the Valinokkam Fishing Harbour Project and if so whether the claimant was entitled to compensation on the ground of delay. The Issue No.17 was whether in terms of contract and plan, the Department handed over the site in the sea for pile driving work. This has been dealt with in paras 66 to 88 of the award. The Arbitrator went in detail considering the various documents and the technical material in Book "Dock and harbour engineering" and the subject "Dredger and Dredging" to come to the conclusion that the dredging was necessary for completion of the project. Reliance was placed on documents Exs.A-51 and A-52, first respondent's letters that dredging should be done, the genuineness of which was not disputed. However, the Department tried to avoid the same stating that they did not receive it. As to the genuineness of the letter and receipt of the same by the Department, the Arbitrator considered the same in Issue No.8 and held in favour of the claimant. Reliance was also placed on Ex.A-55 letter dated 18.1.1989 written by the contractor to the Superintending Engineer that only after completion of dredging work, the claimant would start pitching of boulders. The Arbitrator noticed that

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the casting of 160 piles was over by October, 1985, but the dredging was arranged only in 1988 and was not completed even as on February, 1989. As has been recorded in para 85 of the award, the Arbitrator observed that 10 piles were driven and further work could not be completed for want of dredging. In para 88, the Arbitrator negatived the plea of the Department that no dredging was essential for construction of the RCC Jetty. He, however, came to hold that there was three years and three months delay from October, 1985 to December, 1988 in locating and handing over the site for pile driving and arranging the dredger.

30. In Issue No.6, the Arbitrator considered the question of breach and recession of the agreement. Arbitrator in para 105 observed that the Department has not thought it fit to cancel the contract, on the contrary it allowed the claimant to work upto 11.4.1989, the date on which the contract was terminated. In para 109, the Arbitrator observed that at no point of time, the Department made a complaint about incompetency of the claimant/contractor. The Arbitrator also noticed that in October, 1985, the casting of 160 piles were over and if the Department found that the claimant was not progressing well with the work, they should have terminated the contract. On the other hand they asked him to proceed with the work. A doubt was raised with regard to the capacity of the claimant, experience and ability to undertake the work. However, it was negatived in paras 111, 112 and 113. The Arbitrator in para 116 observing that while the pile driving work was under progress and 10 piles were driven between December, 1988 to February, 1989, the contract was terminated in April, 1989 and in any event, the Department did not pursue the construction of the project in effect they abandoned it for some reason. For the above stated reasons, the Arbitrator held that the Department is responsible for the delay in executing the work. The Arbitrator considering the inordinate delay at every stage of the contract and also with regard to payment and the fact that at the time when the driving of the piles were in progress and inspite of the specific plea of the claimant to extend the time, the Department for some reason terminated the contract on 11.4.1989. The Arbitrator held that the attitude on the part of the Department was responsible for the financial crisis faced by the claimant and therefore, came to hold that the Department had committed breach of agreement and the claimant is entitled for damages thereon.

31. The above findings of the Arbitrator clearly establishes that the delay is on the part of the Department. Appellants are not able to show any material to hold otherwise and in fact, at the time of hearing of the appeals, the counsel for the appellants addressed his arguments only on Issue No.1 and Issue No.2. Issue No.1 relates to claim in respect of value of work done in casting 160 piles and for 10 piles driven into the seabed. Issue No.2 is whether the claimant is entitled to any escalation over the agreement rates at 180% on the value of the work done between 4.7.1985 to 11.4.1989. Therefore, the question that has to be decided in the present appeals is whether the award of the Arbitrator insofar as the Issue Nos.1 and 2 is concerned is justified.

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32. As far as the first claim of the first respondent/claimant is concerned, it relates to casting of 160 piles and the cost incurred for the same. The respondent/claimant has not been fully paid for the work done. The Department's contention is that the first respondent/claimant is not entitled for any amount in excess of the amount already paid. The Department while accepting that the claimant had in fact cast 160 piles as per the agreement, is disputing the award only in respect of the cost of the casting of 160 piles on the basis of the value of materials supplied by the Department, after giving credit to the amounts already paid.

33. At the time of hearing of the appeals, the learned counsel for the appellants referred to various documents filed by the Department and the documents filed by the first respondent/claimant to state that the Arbitrator has not properly construed the documents and has erroneously determined the amounts under the various heads. The first contention was that the value of the pile was not properly arrived and the value of cement and steel supplied by the Department were not considered. The conclusion of the learned Arbitrator and the order of the learned single Judge confirming such conclusion is based on a misinterpretation of the documents and the evidence. The second contention on the same issue is that the number of piles cast was 160 and what was embedded or driven into the sea was only 10 and the quantum of fabrication done was 59 MT. Considering all these factors, the Arbitrator awarded a sum of Rs.4,59,115/-. It is contended that the conclusion of the Arbitrator is erroneous and he has not considered one or other documents properly. The Issue No.1/Claim No.1, which is strenuously disputed by the appellants, is relating to value of work done and the consequent claim. This issue has been dealt with in paragraphs 13 to 30 of the award, the relevant portion of which is extracted hereunder:-

> "Admittedly precasting of 160 piles are are completed. Item No.20 relates to the said work. According to the claimant/petitioner, as per Item No.20, 109 Mt. of works as per the instructions of the Engineer in-charge of the site namely, cutting, binding, grills,etc., except tieing and binding and hence the claimed the bill amount as per item No.20 at the rate of Rs.650/- for 100 kg. and the total value for this item No.20 i.e. Rs.7,08,500/-. Whereas the department had valued this work at Rs.3,82,041/-.
>
> In view of the rates prescribed in the Exs.B.1 for this item of work after giving a margin of Rs.8,500/- foe tieing and binding, I fix the value for the item at Rs.7,00,000/-.

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As regards item No.21, supply of M.S. Angle – iron shoes for piles including fixing charges at the rate of Rs.250/- per pile for 160 pile shoes comes to Rs.40,000/-.

Thus, as regards precasting of 160 piles under the above three items, I fix the value for this work as follows:-

1) Item No.4	....	Rs. 4,16,250/-
2) Item No.20	....	Rs. 7,00,000/-
3) Item No.21	....	Rs. 40,000/-
		Rs.11,56,250/-

As regards the recoveries according to the claimant petitioner,the value of materials like cement and steel supplied by the department is Rs.3,47,288/-, while according to the department's calculations in respect of recoveries arrived at Department materials such as supply of cement and steel, water charges, withheld amount, additional security deposit income tax, cost of gunny bags which comes to Rs.5,87,832/-.

28. Since the claimant/petitioner admitted the receipt of cement and steel as per the entries in Ex.B.5, which is supported by Ex.B.32, wherein he had signed, but he had only disputed the dates, I accept the valuation given by the department towards the supply of cement and steel which comes to Rs.4,87,530.87 and also water charges Rs.1,239/- and the price of empty gunny bags Rs.2,450/- and income tax Rs.16,544/- and under all the above heads it comes to Rs.5,07,771.87. As regards the recoveries with regard to withheld amount of Rs.41,359.05 p. and additional security amount of Rs.38,700/- total comes to Rs.89,059.05 p. In view of my findings that the termination is not legal and not valid, the respondents department are not entitled to deduct the same out of the amount payable to the claimant/petitioner.

29. According to the claimant/petitioner, he had received payment of Rs.2,20,000/- towards the payment of bills while according to the defendant respondents, the net payment is Rs.2,39,369/- under various cheques. Since even according to the claimant/petitioner, he is unable to give the accurate amount for want of records

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not available with him. I accept the version of the department that they had paid Rs.2,39,369/-. Thus the deduction works out to Rs.5,07,771.87 p. + Rs.2,39,363/- = Rs.7,47,134/87 p. In the result, after deducting Rs.7,47,134.87 p. out of amount Rs.11,56,250/- towards the value of work for precasting of 160 piles I find that the contractor/petitioner is entitled to Rs.4,09,115.13 p. which is rounded up to Rs.4,09,115/-.

30. Next we have to consider the value of work to be paid to the claimant/petitioner towards 10 piles driven and the value for this item has to be fixed as per item No.5 and 6 of schedule specifications rates fixed in Ex.B.1.

1) In respect of item No.5:
Handling and conveying the RCC precast piles pile 10 Nos. measurement according to claimant arrived at 152 RM at Rs.100 per R.M. 152 RM X 100
= Rs.15,200/-

While department value for this item comes to 154 RM x 100
= Rs.15,400/-

However, the value given by the contractor which is low, is accepted.

2) In respect of item No.6:-
According to claimant, total No.10, piles driven at 150 RM @ Rs.290/- per RM = Rs.290 X 150 RM.
= Rs.43,500/-

Thus the contractor/petitioner has valued both items at Rs.58,700/-. While the department/respondents has given under these two items as Rs.47,296.05 p. giving allowance on exaggeration on both sides. I fix the value for these works at Rs.50,000/-. Thus the claimant/petitioner is entitled for a sum of Rs.4,59,115/- and this issue is answered accordingly."

From the above findings of the Arbitrator, the claim of the appellants Department is totally without any basis as the said amount has been determined based on Ex.B-1 agreement and the Arbitrator has given appropriate deduction for the value of cement and steel supplied by the

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Department and the amount received by the claimant also has been deducted. It is also pertinent to note that the Arbitrator has granted the cost for work done only in respect of 10 piles in a sum of Rs.43,500/-. Therefore, the contention of the appellant that the values have been erroneously arrived, cannot be accepted.

34. One other plea taken is that vital documents required to be considered were not considered by the Arbitrator and the learned counsel for the appellants referred to the documents filed in the form of additional typedset of papers. He referred to document Ex.B-32 USR Slip and the memo of calculation and stated that these were not considered. This contention has to be rejected at the outset as we find that the USR Slip Ex.B-32 has been discussed in more than one place in paragraphs 16, 18 and 28 of the award. The memo of calculation was submitted on 5.12.1998 belatedly and that has been dealt with in para 22 of the award. The evidence of R.W.1 on 17.6.1997 was also relied upon for the purpose of considering Ex.B-32. It, therefore, follows that these documents were considered by the Arbitrator in detail and Issue No.1 was decided. Learned single Judge also considered the same and the Department plea was rejected. Therefore, the plea of non-consideration of vital documents cannot be accepted. In any event, at this stage, it will not be proper to look into individual slip and rework the calculation. The decision of the Apex Court in K.P.Poulose – v. - State of Kerala 1975 SC 1259, para 6 referred to by the appellants' counsel will not be applicable to the facts of the present case as the Arbitrator has gone into those documents and decided the claim. The learned single Judge has extensively dealt with this issue and upheld the award. We are constrained to say so only for the reason that sitting in appeal against the order of single Judge confirming the award, the Court is not expected to reappreciate the evidence, documents and records unless it is shown that the conclusions are palpably erroneous and unreasonable. Even as per the grounds in both the appeals, the appellants' contention is on the quantum of work done and the value which cannot be canvassed at this point of time. With regard to the jurisdiction of the Court to interfere with the award the learned single Judge has in para 15 referred to the decision the State of U.P. - v. - Ramnath International Construction (P) Ltd (1996) 1 SCC 18. The learned single Judge has also referred to the decision in State of Rajasthan – v. - Puri Constructions Co. Ltd. (1994)6 SCC 485 to state that award cannot be set aside merely on the ground that there is a misreading, misconstruction or misappreciation of material on records, nor can it be set aside merely because on Courts own assessment and an alternative view is possible. In so far as Claim No.1 is concerned the Arbitrator appreciating the claimant's case and the stand of the Department based on oral and documentary evidence extensively dealt with the contentions in paras 13 to 30 of the award and determined the amount. Even if there is any minor discrepancy that cannot be a ground for the appellate Court to reconsider the same. Therefore, the conclusion of the Arbitrator insofar as Issue No.1 does not require reconsideration as contended by the learned counsel for the appellants.

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35. The second contention that was argued by the counsel for the appellants was regarding escalation charges. The claimants made a claim for escalation 180% for the work done during the period 4.7.1985 to 11.4.1989 and a sum of Rs.15,90,660/-. This was considered in Issue No.2 in paras 147 to 170 of the award. The main contention of the appellants before the Arbitrator as well as before the learned single Judge is that there was no clause for escalation and the Arbitrator erred in granting the said sum of Rs.9,17,195/- by referring to various other contracts and on account of the alleged delay. It was contended that the escalation was based on value of work done. Besides stating that the raw material was supplied by the Department, it is contended that in the absence of a specific clause in the agreement providing for escalation, the claimant is not entitled to the same. Even, the 20% escalation charges was requested and granted by the Government, eventhough it was not part of the agreement. This contention of the appellants has to be accepted in view of the decision of the Apex Court in the case of State of Orrissa – vs. - Sri S.C. Roy (dead) by L.Rs. JT 2001 (5) SC 267. Para 4 which is relevant is extracted hereunder:-

> "4. Both the issues are no longer res-integra. Insofar as the Award of claim of escalation is concerned, it stands settled by this Court in Secretary, Irrigation Department, Government of Orissa & Ors. v. G.C.Roy (JT 1991 (6) SC 349) wherein it has been held that where arbitration agreement contains no escalation clause, the Arbitrator does not have any jurisdiction to Award any amount towards escalation. In the instant case, we find that there is no escalation clause in the arbitration agreement and a specific objection was raised by the appellant before the Arbitrator in that behalf. That part of the Award, therefore, which grants escalation charges is not sustainable, as it suffers from a patent error. The decree insofar as the Award of escalation charges is concerned, therefore, cannot be sustained and is hereby set aside."

Eventhough the agreement did not provide for an escalation cost and the Government has independently considered the claim for escalation at 20% and granted the same, the Arbitrator has decided the claim for further escalation. The 20% escalation was negotiated between parties and paid separately and it is not part of the agreement and therefore, the claim on this head cannot be accepted in law. The Arbitrator erred in awarding the sum of Rs.9,17,195/- under Issue No.2. We are unable to accept this part of the award, particularly in view of the decision of the Apex Court stated above.

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36. Insofar as counter-claim is concerned the Arbitrator discussed the same in paras 31 to 46 of the award and allowed counter claim No.1 for mobilisation charges paid and rejected the other two counter claim. Though a ground has been raised on this issue, the counsel is not able to substantiate the Department's plea. In any event, counter claim No.2 is regarding over payment to the claimant and is based on arithmetical calculation. We do not propose to delve on the same. Counter claim No.3 is for refund of EMD and additional EMD, the Arbitrator rejecting it on the ground that the claimant did not breach the agreement and the termination of the contract by appellants is not valid. We have concurred with this finding in Issue No.6 that the fault was on the part of Department and the counter claim No.3 was rightly rejected. The counsel for appellants pleaded that compensation for loss suffered by the claimant on account of overheads and loss suffered during the period in question and loss on account of damage due to idle machinery, equipment and other construction materials withheld by the department for the period of 18 months and the Arbitrator awarded on this head is not justified. He, further pleaded that a sum of Rs.10,00,000/- is awarded for the machinery, which were not returned, with a further direction that if the machinery are returned, the same can be deducted is also not correct. All these issues have been dealt with in detail in paras 171 to 178 and 180 to 213 in the award.

37. The whole case of the claimant is only on account of the delay on the part of the department in not concluding the contract in time, not providing the material and not providing the site in time and delay in payment. The Arbitrator has taken into consideration all these facts into consideration and dealt with the above issues in detail and determined the claim. Reasons have been recorded for arriving at the amount in respect of each claim and it is based on oral and documentary evidence. Unless appellants can establish that the Arbitrator has misconducted himself in terms of Section 30(a) and 30(c) of the Arbitration Act, the award should not be interfered with. The learned single Judge while considering the relevant issues and considering the documents and evidence confirmed the award. As stated earlier the learned counsel for the appellants/Department, confined his arguments mainly to issue Nos.1 and 2. Except the ground relating to escalation we do not find any good reason to interfere with the award of the Arbitrator in other respects. The order of the learned single Judge confirming the award of the Arbitrator is correct except insofar the claim with regard to escalation as decided in Issue No.2.

38. In the light of the Apex Court decision and for the reasons as above we set aside that portion of the Award regarding Claim No.2 Issue No.2 relating to claim for escalation as confirmed by the learned single Judge.

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39. In the light of the above findings of this Court, the award of the Arbitrator insofar as it relates to Issue No.2 in a sum of Rs.9,17,195/- with interest is concerned is set aside and the award on other heads are confirmed and the order of the learned single Judge stands modified to that extent. Both the Original Side Appeals stand partly allowed. In the facts and circumstances of the case, there will be no order as to costs.

Sd/-
Asst. Registrar.

/true copy/

Sub Asst. Registrar.

ts.

To
1.The Secretary to Government,
Animal Husbandry &
Fisheries Department,
Chennai-9.
2.The Director of Fisheries,
Anna Salai,
Teynampet,
Chennai-6.
3.The Superintending Engineer,
Fisheries & Harbour Circle,
Nagercoil,
now at the office of the
Director of Fisheries,
D.M.S. Office,
Anna Salai,
Chennai-6.
4.The Sub-Assistant Registrar
(Original Side)
High Court, Madras-104.
+ 1 CC To Mr.G.R.Swaminathan, Advocate SR NO.59604
+ 1 CC to the Government Pleader SR NO 59025

O.S.A.Nos.406 and 407 of 2000

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